

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARONDO AUSTIN,

No. C 12-05187 YGR (PR)

Plaintiff,

**ORDER OF DISMISSAL WITH LEAVE  
TO AMEND**

v.

J. CERMENO, et al.,

Defendants.

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**INTRODUCTION**

Plaintiff filed this *pro se* civil rights complaint under 42 U.S.C. § 1983. He also seeks leave to proceed *in forma pauperis*, which will be granted in a separate Order.

The Court now conducts its initial review of the complaint pursuant to 28 U.S.C. § 1915A.

**DISCUSSION**

**I. Standard of Review**

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

1 A supervisor may be liable under § 1983 upon a showing of personal involvement in the  
2 constitutional deprivation or a sufficient causal connection between the supervisor's wrongful  
3 conduct and the constitutional violation. *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th  
4 Cir. 1991) (en banc) (citation omitted). A supervisor therefore generally "is only liable for  
5 constitutional violations of his subordinates if the supervisor participated in or directed the  
6 violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d  
7 1040, 1045 (9th Cir. 1989). This includes evidence that a supervisor implemented "a policy so  
8 deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the  
9 constitutional violation." *Redman*, 942 F.2d at 1446; see *Jeffers v. Gomez*, 267 F.3d 895, 917 (9th  
10 Cir. 2001).

## 11 **II. Exhaustion**

12 A question which must be answered before Plaintiff can proceed with his claims is whether  
13 he has exhausted available administrative remedies with respect to each claim.

14 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996)  
15 (PLRA), amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to  
16 prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any  
17 jail, prison, or other correctional facility until such administrative remedies as are available are  
18 exhausted." 42 U.S.C. § 1997e(a). Under this section, an action must be dismissed unless the  
19 prisoner exhausted his available administrative remedies *before* he filed suit, even if the prisoner  
20 fully exhausts while the suit is pending. See *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir.  
21 2002). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether  
22 they involve general circumstances or particular episodes, and whether they allege excessive force  
23 or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). Exhaustion of all "available"  
24 remedies is mandatory; those remedies need not meet federal standards, nor must they be "plain,  
25 speedy and effective." *Id.* at 524; *Booth v. Churner*, 532 U.S. 731, 739-40 & n.5 (2001). Even  
26 when the prisoner seeks relief not available in grievance proceedings, notably money damages,  
27 exhaustion is a prerequisite to suit. *Id.* at 741. The purposes of the exhaustion requirement include  
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1 allowing the prison to take responsive action, filtering out frivolous cases and creating an  
2 administrative record. *See Porter*, 534 U.S. at 525.

3 A prisoner's concession to nonexhaustion is a valid ground for dismissal, so long as no  
4 exception to exhaustion applies. *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir.), *cert. denied*, 540  
5 U.S. 810 (2003). Accordingly, a claim may be dismissed without prejudice if it is clear from the  
6 record that the prisoner has conceded that he did not exhaust administrative remedies. *Id.*

7 The State of California provides its inmates and parolees the right to appeal administratively  
8 "any departmental decision, action, condition or policy perceived by those individuals as adversely  
9 affecting their welfare." *See* Cal. Code Regs. tit. 15, § 3084.1(a). It also provides its inmates the  
10 right to file administrative appeals alleging misconduct by correctional officers. *See id.* § 3084.1(e).  
11 In order to exhaust available administrative remedies within this system, a prisoner must proceed  
12 through several levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602  
13 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level  
14 appeal to the Director of the California Department of Corrections and Rehabilitation. *See id.*  
15 § 3084.5; *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies the  
16 administrative remedies exhaustion requirement under § 1997e(a). *See id.* at 1237-38.

17 Here, the record is unclear whether Plaintiff exhausted his claims to the Director's level  
18 before filing his federal complaint. Plaintiff contends that his "appeals [were] never returned back to  
19 him." (Compl. at 2.) He adds that he filed "several appeals that [were] intentional[ly] and  
20 unjustifiabl[y] interfered with . . . hindering [his] rights to exhaust [his] remedies fully." (*Id.*)  
21 However, Plaintiff's allegations are conclusory because he does not support them with additional  
22 information relating to these appeals, i.e., the dates they were submitted or the claims that he  
23 attempted to exhaust. It thus appears Plaintiff has not exhausted his administrative remedies as  
24 required by 42 U.S.C. § 1997e(a).

25 Accordingly, it appears that Plaintiff's claims are unexhausted and subject to dismissal.  
26 Therefore, Plaintiff's complaint is DISMISSED with leave to amend his complaint to prove that he  
27 exhausted all of his claims against each Defendant *before* he filed this action. If Plaintiff did  
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1 exhaust his administrative remedies with respect to any or all of those claims before filing this  
2 action, he may amend his complaint to so allege, as set forth below.

### 3 CONCLUSION

4 For the foregoing reasons, the Court orders as follows:

5 1. Within **twenty-eight (28) days** from the date of this Order, Plaintiff shall file an  
6 amended complaint as set forth above. Plaintiff must use the attached civil rights form, write the  
7 case number for this action -- Case No. C 12-05187 YGR (PR) -- on the form, clearly label the  
8 complaint "Amended Complaint," and complete all sections of the form. Because an amended  
9 complaint completely replaces the original complaint, Plaintiff must include in it all the claims he  
10 wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.), *cert. denied*, 506 U.S. 915  
11 (1992); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987); *London v. Coopers & Lybrand*, 644 F.2d  
12 811, 814 (9th Cir. 1981). He may not incorporate material from the original complaint by reference.  
13 He must also specify whether he exhausted or was prevented from exhausting his administrative  
14 remedies with respect to any or all of those claims before filing this action. **Plaintiff's failure to file**  
15 **an amended complaint by the deadline will result in the dismissal of this action without**  
16 **prejudice.**

17 2. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
18 informed of any change of address and must comply with the Court's orders in a timely fashion.  
19 Pursuant to Northern District Local Rule 3-11 a party proceeding *pro se* whose address changes  
20 while an action is pending must promptly file a notice of change of address specifying the new  
21 address. *See* L.R. 3-11(a). The Court may dismiss without prejudice a complaint when: (1) mail  
22 directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and  
23 (2) the Court fails to receive within sixty days of this return a written communication from the *pro*  
24 *se* party indicating a current address. *See* L.R. 3-11(b).

25 3. Extensions of time are not favored, though reasonable extensions will be granted.  
26 Any motion for an extension of time must be filed no later than **fourteen (14) days** prior to the  
27 deadline sought to be extended.  
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1           4.       The Clerk of the Court shall send Plaintiff a blank civil rights form along with a copy  
2 of this Order.

3           IT IS SO ORDERED.

4   DATED: June 4, 2013

  
YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE